BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. GOUDY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,060,420
	)	1,060,421 & 1,049,789
BRINK ENGINEERING SOLUTIONS	)	
EXIDE TECHNOLOGIES	)	
Respondents	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE	)	
AMERICAN ZURICH INSURANCE	)	
Insurance Carriers	)	

ORDER

Claimant requests review of the September 17, 2012, Post-Award Medical (1,049,789) and Preliminary Hearing Order (1,060,420 & 1,060,421) entered by Administrative Law Judge Bruce E. Moore.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, represents the claimant. Karl L. Wenger, of Kansas City, Kansas, represents Brink Engineering Solutions and its carrier Zurich American Insurance. Dustin Denning, of Salina, Kansas, represents Exide Technologies and its carrier American Zurich Insurance.

RECORD AND STIPULATIONS

The record for this appeal consists of the Preliminary Hearing and Post Award Hearing Transcript from August 3, 2012, with exhibits attached, and the documents filed of record with the division. Pursuant to the stipulation of the parties, the record further includes the August 17, 2012, independent medical examination report of Chris D. Fevurly, M.D.

ISSUES

The Administrative Law Judge (ALJ) found the following:

In Docket No. 1,049,789, claimant's current need for groin treatment is a natural and probable consequence of the 2005 work injury at Exide Technologies and Exide is responsible for the care and treatment of the groin complaints. Exide was ordered to provide the names of two physicians for claimant to designate a treating physician.

In Docket No. 1,060,421, Judge Moore determined, and claimant conceded, that there is no evidence of a recurrent hernia, his groin complaints following the 2005 work injury never fully resolved and his current diagnosis is the same as it was before the alleged March 8-13, 2012 work activity. There is no evidence that the act of carrying track jacks was the prevailing factor in causing claimant's complaints or need for treatment.

In Docket No. 1,060,420, the ALJ determined claimant failed to establish that timely notice of a claimed March 9, 2012, accident was provided to respondent. Claimant's preliminary hearing requests were denied.

Claimant does not dispute the ALJ's findings in Docket Nos. 1,060,421 and 1,049,789, arguing only the ALJ's finding in Docket No. 1,060,420. Claimant requests review of (1) whether he suffered accidental injury arising out of and in the course of his employment; (2) whether his alleged injuries, if they did occur, are the prevailing factor in causing his current medical condition and need for treatment; (3) whether he provided timely notice; (4) average weekly wage; and (5) whether he is entitled to medical treatment and temporary total disability benefits. Claimant argues that the ALJ's Order in Docket No. 1,060,420 should be reversed and medical treatment and temporary total disability benefits granted.

Brink Engineering Solutions and its carrier Zurich American Insurance (Docket No. 1,060,420) contend that claimant has failed to meet his burden of proving that he suffered an accidental injury arising out of and in the course of his employment and has failed to prove he suffered an accidental injury to his left knee which is the prevailing factor in causing his current condition or his current need for medical treatment. Brink contends that claimant had a prior left knee injury and that his current medical condition is the direct and natural consequence of the prior injury or an aggravation of that prior injury and is therefore not related to his work with Brink. Further, Brink contends that claimant failed to provide timely notice in accordance with K.S.A. 2011 Supp. 44-520. The ALJ found claimant failed to provide timely notice of the accident. Therefore, respondent contends claimant's request for benefits should be denied and the ALJ's Order in Docket No. 1,060,420 be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for Brink Engineering Solutions on January 24, 2012. Claimant testified that he had hernia problems prior to going to work for Brink, while he was working for Exide Technologies.

Claimant was hired at Brink by Danny Llamia, his nephew. Mr. Llamia was the supervisor/crew leader. Claimant was hired as a crane operator and was to be paid $45 an hour for 40 plus hours per week. Claimant worked for Brink until March 13, 2012. Claimant's job was to make sure that the materials, people and equipment got to the job sites, which at that time were railroad bridges.

Claimant had experienced problems with his left knee prior to going to work for Brink and had undergone surgery on the knee in June 2009. The surgery improved the function of his knee. He had no symptoms in the knee before he started working for Brink. However, he acknowledged he had some soreness in his left knee, but felt that was normal from working and figured everyone got that.

Claimant alleges a work-related injury to his left knee on March 9, 2012.[1] He testified he slipped, twisted and fell against a welder hitting his left knee while climbing up a crane. Claimant estimated it was a 15-20 foot drop from the crane to the ground. He immediately noticed a sharp pain in his left knee. He reported this to Mr. Llamia, who was standing close by. Claimant told Mr. Llamia that he pinched his knee, but that he would be alright. Claimant continued to work the rest of the day, about three hours. Claimant experienced pain in the knee the rest of the day, which he described as enough to get his attention.

Claimant did not work on March 10 or 11, 2012. His last day of work for Brink was March 13, 2012, due to a dispute over his paycheck. At the time of the preliminary hearing claimant did not have a permanent job and had been doing odd jobs. After leaving his employment, claimant attempted to obtain medical treatment on his own for his knee with his family physician, Dr. Sara Johnston, but was turned away because it involved a workers compensation claim.

Claimant was sent by his attorney to see orthopedic surgeon C. Reiff Brown, M.D. for the left knee. Dr. Brown was aware that claimant had injured his left knee in the summer of 2009 while helping a friend out of a hot tub and felt a snapping sensation and

[1] Docket No. 1,060,420.

sharp pain in the knee. Claimant underwent a successful knee surgery at that time. Claimant alleges that he had no further knee issues until March 9, 2012, when he injured his knee while working on the crane.

Dr. Brown noted when he met with claimant on June 11, 2012, claimant had not received any treatment for this knee injury and had severe swelling, pain and weakness. Dr. Brown concluded that claimant needed to see an orthopedic surgeon for an evaluation. He felt there was a causal connection between claimant's work activity and the accident on the crane and that accident was the prevailing factor which caused the injury, claimant's present medical condition and the need for additional treatment.

Claimant testified he is in need of the treatment suggested by Dr. Brown because of the difficulty he is having, including waking up at night with pain, trouble getting in and out of the car, trouble getting off of the floor and of testicle pain. Dr. Brown suggested claimant avoid frequent long walks, squatting, crawling and kneeling, and to use caution when walking over rough or irregular surfaces because of his instability.

Claimant was referred by the ALJ to board certified internal and occupational medicine specialist Chris D. Fevurly, M.D., for an independent medical examination on August 17, 2012. Dr. Fevurly was provided a thorough background history of claimant's prior employment and prior injuries and related physical problems. He noted claimant's left knee injury in 2009 which led to the left lateral meniscal repair with debridement and chondroplasty for grade III chondromalacia. The medical records indicate claimant returned to work in about 10 weeks, with pain following the return to work. However, claimant was provided no permanent restrictions for this injury and missed no work after the return to work.

Claimant has alleged a right groin injury on March 8, 2012, while carrying heavy tools. He told Dr. Fevurly that the heavy lifting would aggravate his right inguinal pain and resulted in popping in the left knee. That groin injury is not part of this claim. However, claimant is alleging the most recent left knee injury occurred the next day on March 9,2012.

Claimant last worked for respondent Brink on March 13, 2012, after a dispute arose regarding an absence from work for a dentist appointment. Claimant told Dr. Fevurly that he wanted to talk to the owner of Brink about the left knee injury but "never got a chance to do this before he left the job."[2]

Dr. Fevurly diagnosed claimant with advanced chondromalacia of the lateral femoral condyle of the left knee. However, Dr. Fevurly was unable to diagnose a progression of claimant's chondromalacia as the result of either the March 8 or March 9, 2012, events.

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[2] Dr. Fevurly's August 17, 2012 IME report at 5.

An Affidavit dated July 31, 2012, and signed by Daniel Llamia was admitted into evidence at the time of the hearing. Mr. Llamia denied witnessing any accident involving claimant on or about March 9, 2012, and denied being told of any accident to claimant's left knee at any time.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2011 Supp. 44-501b, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2011 Supp. 44-508(d)(f)(1) states in part:

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[3] K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2011 Supp. 44-501b(b).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> (d) ‘‘Accident’’ means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ‘‘Accident’’ shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

Claimant has raised issues dealing with whether he suffered personal injury by accident on March 9, 2012. However, the ALJ, on page 6 of the Post-Award Order and Preliminary Hearing Order, after discussing both the definition of injury and the definition of accident, states: “Either laxity in the ligaments or a torn ligament satisfies the statutory requirement for a ‘lesion or change in the physical structure of the body’” and “Falling and striking a knee on a welder satisfies the statutory definition of an ‘accident.’” It appears the ALJ found that claimant suffered both an accident and an injury sufficient to satisfy the definitions contained in K.S.A. 2011 Supp. 44-508. In the Order, the ALJ discusses “prevailing factor” in relation to this alleged accident. However, he renders no decision on that issue.

K.S.A. 2011 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.

> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Respondent contends claimant failed to satisfy the notice requirements of the above statute. The ALJ analyzed the statutory time limits in significant detail and determined that claimant failed to prove timely notice. This Board Member agrees. Claimant contends he told Mr. Llamia of the accident on the date of the accident, alleging that Mr. Llamia was standing nearby. Mr. Llamia denies any knowledge of an accident to claimant on or about March 9, 2012. Additionally, claimant told Dr. Fevurly that he wanted to tell the owner of his accident, but never got the chance. The ALJ had the opportunity to observe claimant testify and found his credibility lacking. The statutory requirements dealing with timely notice are date specific. Claimant failed to satisfy those legislative requirements. The first identified written claim in this matter was on April 9, 2012. This is also the first time notice of the accident is proven in this record. That date is over 30 days from the date of accident and over 20 days from claimant's last day worked with respondent. Therefore, the denial of benefits for the left knee injury due to a lack of timely notice is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this

[7] K.S.A. 2011 Supp. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he provided timely notice of his alleged March 9, 2012 accident. The denial of benefits for claimant's left knee injury is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Post-Award Medical and Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated September 17, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge